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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 KEVIN L. THOMAS,

11 Petitioner,

Case No. C08-1830-RSL-BAT

12 v.

13 STEVE SINCLAIR,

14 Respondent.

REPORT AND RECOMMENDATION

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16 INTRODUCTION AND SUMMARY CONCLUSION

17 Petitioner is a state prisoner who is currently incarcerated at the Stafford Creek
18 Corrections Center in Aberdeen, Washington. He seeks relief under 28 U.S.C. § 2254 from his
19 2006 King County Superior Court conviction on a charge of robbery in the second degree.
20 Respondent has filed an answer to the petition in which he argues that the petition should be
21 dismissed because petitioner failed to exhaust his state court remedies. Petitioner has filed no
22 response to respondent's answer. Following a careful review of the record, this Court concludes
23 that petitioner's federal habeas petition should be dismissed without prejudice for failure to
24 exhaust state court remedies.
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Petitioner filed a direct appeal in the Court of Appeals of Washington, Division I.

Petitioner, through counsel, identified the following assignment of error in the brief of appellant:

(*Id.*, Ex. 2 at 1.)

The Court of Appeals affirmed petitioner's conviction in an unpublished opinion filed on March 31, 2008. *See State v. Thomas*, 2008 WL 836393 (Wash.App. Div. 1). Petitioner thereafter filed a motion for reconsideration which was denied on June 13, 2008. (*Id.*, Ex. 6.)

On November 29, 2008, petitioner directed a letter to the clerk of the Washington Supreme Court requesting yet another extension of time to file a petition for review. (*Id.*, Ex.

12.) The letter was received at the Supreme Court on December 4, 2008, and was placed in the closed file without action because the matter had been dismissed by the October 10, 2008, ruling and no timely motion to modify that ruling had been filed. (Dkt. No. 15, Ex. 12.)

On December 11, 2008, petitioner signed his federal habeas petition and the petition was received by this Court for filing on December 23, 2008. (*See* Dkt. No. 7.) Petitioner identifies the following four assignments of error in his petition: (1) the trial court erred when it refused to reinstate petitioner's constitutional right to trial by jury; (2) petitioner was denied effective assistance of counsel; (3) the prosecutor committed misconduct; and (4) petitioner was denied his right to a speedy trial. (*See id.* at 5, 7, 8, and 10.)

DISCUSSION

Respondent argues in his answer that petitioner failed to fully and fairly exhaust any of his federal habeas claims because he failed to present those claims to the Washington Supreme Court for review. Respondent further argues that because petitioner's claims are unexhausted, they are not cognizable in this federal habeas petition, and the petition should therefore be dismissed without prejudice.

A state prisoner is required to exhaust all available state court remedies before seeking a federal writ of habeas corpus. 28 U.S.C. § 2254(b)(1). The exhaustion requirement is a matter of comity, intended to afford the state courts "an initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Picard v. Connor*, 404 U.S. 270, 275 (1971)(internal quotation marks and citations omitted). In order to provide the state courts with the requisite "opportunity" to consider his federal claims, a prisoner must "fairly present" his claims to each appropriate state court for review, including a state supreme court with powers of

1 discretionary review. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (citing *Duncan v. Henry*, 513
2 U.S. 364, 365 (1995), and *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999)).

3 The record before this Court makes clear that petitioner failed to present any of his
4 federal habeas claims to the Washington Supreme Court for review. Thus, as respondent
5 correctly argues, petitioner's claims are not cognizable in this federal habeas action.
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7 CONCLUSION

8 Based upon the foregoing, this Court recommends that petitioner's federal habeas petition
9 be dismissed without prejudice for failure to exhaust state court remedies. A proposed order
10 accompanies this Report and Recommendation.

11 DATED this 2nd day of October, 2009.

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15 BRIAN A. TSUCHIDA
16 United States Magistrate Judge
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